## TABLE OF CONTENTS


Page

Table of Authorities ..... i

Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Statutes Involved ..... 3

Statement of the Case ..... 3

Argument ..... 7

I. Petitioners Merely Seek Another Review of the Evidence ..... 7

II. Both Decisions Below Are Clearly Correct.. 7

III. The Decisions Below Are Sustainable On Independent, Alternative Grounds ..... 8

IV. There Is No Direct Conflict of Decision .... 10

V. There Is No Important Question of Federal Law ..... 11

Conclusion ..... 12

Certificate ..... 13


## TABLE OF AUTHORITIES

### Cases


Belliston v. Texaco, Inc., 455 F.2d 175 (10 Cir. 1972), cert. denied 408 U.S. 928 (1972) ..... 11

Berinyi v. Immigration Director, 385 U.S. 630, 635, 87 S.Ct. 666, 17 L.Ed.2d 656, 661 (1967) ..... 8

TABLE OF AUTHORITIES (Continued)

Page

First National Bank v. Cities Service Co., 391 U.S. 253, 289-290, 283, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) ..... 3, 4

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672, 677 (1949), 339 U.S. 605 ..... 8

Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5 Cir. 1973), cert. denied 414 U.S. 1116 (1973) ..... 11

The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 723, 726, reh. denied 359 U.S. 999 (1956) ..... 10

United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925, 926 (1925) ..... 7

In re Western Liquid Asphalt Cases [Copp Paving Co., Inc. v. Gulf Oil Co.], 487 F.2d 202 (9 Cir. 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974) ..... 9, 11

Statutes

15 USC § 13(a) ..... 10, 11

15 USC § 13(b) ..... 3, 9

15 USC § 13(f) ..... 10

15 USC § 15 ..... 3, 9

28 USC § 1219 ..... 2

28 USC § 1292(b) ..... 2

Other Authorities

Federal Rules of Civil Procedure, Rule 60(a) ..... 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

---

No. 74-94

---

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.,
Petitioners,

versus

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., and UNITED CEMENT COMPANY,
Respondents.

---

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

# BRIEF IN OPPOSITION FOR UNITED CEMENT COMPANY

---

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the unreported Opinion of the District Court, 494 F. 2d 778, petition for rehearing *en banc* denied June 25, 1974, ____ F. 2d ____,

is correctly cited and attached as Appendix B to the Petition.

However the Opinion of the District Court, characterized as "careful and wide-ranging" by the Fifth Circuit (Pet. p. 80a), is not correctly reproduced in Appendix A to the Petition. Appendix A to the Petition does not contain the clerical corrections to the District Court's Opinion which were entered of record on the face of the Opinion by interlineation by the District Court pursuant to Rule 60(a), F.R.Civ.P. The Rule 60(a) Order of clerical corrections is correctly set out in Appendix 1 to Respondent Litton's brief in opposition. Correlation thereof to the page numbers of Petition Appendix A is correctly accomplished by Appendix 2 to Litton's brief.

## JURISDICTION

The requisite jurisdictional citations are adequately set out in the Petition, except that the jurisdiction of the Court of Appeals was based on 28 USC § 1219 (appeal from final decision). It was not based on 28 USC § 1292(b) (certified interlocutory appeal) as erroneously asserted in the Petition (Pet. p. 2).

## QUESTIONS PRESENTED

The questions presented are adequately stated in Respondent Litton's brief in opposition at pages 2-3 thereof. United adopts the same here.

## STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out in the Petition at pages 4-5, the following statutory provisions are also involved:

15 USC § 15 (suits by persons injured), stating in pertinent part:

> Any person *who shall be injured in his business or property by reason of* anything forbidden in the antitrust laws may sue therefor .... (Emphasis added).

15 USC § 13(b), stating in pertinent part:

. . . .

> . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor ....

## STATEMENT OF THE CASE

In this private antitrust action brought in quest of treble damages and attorneys fees both the District Court and the Court of Appeals found this case ripe for full summary judgment under the guidelines in antitrust of *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-290, 283, 88 S.Ct. 1575, 20 L.Ed.2d 569

(1968). The Court of Appeals characterized the discovery as "extensive and exhaustive" (Pet. p. 79a). It repeatedly noted the absence of any genuine issue of material fact (e.g. Pet. pp. 82a-85a). The "careful and wide-ranging opinion" of the District Court was to the same effect (e.g. Pet. pp. 19a-20a, 26a, 73a-74a). Petitioners-plaintiffs filed this action in April, 1971 and conducted discovery for more than one year before the motions for summary judgment were even filed. All material witnesses were deposed in comprehensive discovery proceedings which were not curtailed in any way. Likewise Petitioners-plaintiffs filed no affidavits whatsoever in opposition.

On this backdrop, United must correct several glaring mistatements of fact contained in the Petition, in addition to the clarifications made by Litton in its brief. The detailed Opinion of the District Court, as well as the Opinion of the Court of Appeals, correctly and accurately refutes Petitioners' misstatements of fact as to United.

At page 7 the Petition erroneously asserts United's cement quotations met neither Petitioners' price nor the price of Petitioners' competitors (H&W). However, both the District Court and the Court of Appeals expressly found to the contrary. As summarized by the Court of Appeals:

> As for the designation of United as "sole source" of cement, and its quotation of a lower price to plaintiff's competitor than to plaintiffs. . . . *United did not originate the price*

*differential, it took it as it found it.* (Pet. p. 83a Emphasis added).

The Court of Appeals added:

> So far from conspiring with Litton to maintain it, the record indicates strenuous efforts by Litton to persuade United's Reese to quote the same price to both ready-mix bidders and his refusal to do so on advice of his counsel that such an action would interfere with the competitive situation and lay United open to some such suit as this. There is no evidence here of a combination to price-disadvantage plaintiffs, rather the contrary. Nor do plaintiffs allege or offer proof that United's advent as "sole supplier" froze the cement quotation to plaintiffs. For all that appears in the record, United would have been pleased to meet any lower price which plaintiffs could have confronted it with — down, at least, to that which it had quoted the competitor. No bias against plaintiffs appears here; indeed, as Reese averred, United would have preferred plaintiffs get the contract so as to sell the same amount of cement at a larger profit. (Pet. pp. 83a-84a).

To the same effect, the District Court summarized:

> Even if United was designated as a sole source supplier by Litton, the price per barrel of cement which it quoted to plaintiffs and

> H & W were the same low prices that each already had, and did not alter the competitive position of either by changing their cost of cement and thus changing the price of ready-mix concrete. (Pet. p. 71a).

See the District Court's Opinion at Pet. pp. 22a-24a, 30a-31a, 36a, 52a, 71a, where the facts, undisputed of record are reported in detail.

Petitioners-plaintiffs bought no cement from United. Neither did Petitioners' competitors, H & W, as the Court of Appeals confirmed:

> In the end the competitor [H & W] found a better price and bought none of it [from United]. (Pet. p. 79a, note 7).

The District Court's Opinion repeatedly confirms this at Pet. pp. 23a-24a, 32a, 39a-50a.

As to the assertion Litton inaccurately advised Petitioners' competitors, H & W, that Petitioners had bid $11.62/cu. yd., both the Court of Appeals and the District Court found, "the record is clear that United did not even know of it. . . ." (Court of Appeals, Pet. p. 84a). See also District Court Opinion at Pet. p. 26a. As to Scribner and Rust, see the detailed findings of the District Court at Pet. pp. 26a-29a.

## ARGUMENT

### I.

### Petitioners Merely Seek Another Review of the Evidence

This case obviously turns narrowly on its unique facts. It also turns on firmly entrenched, long-established principles of law. No amount of strained semantics can convert it into one warranting review by this Court on certiorari.

The gravamen of the Petition is its thinly veiled quest for another review of the evidence. Petitioners merely seek to continue their quarrel with the factual determinations by the District Court, affirmed by the Court of Appeals. Yet Petitioners have had their statutory factual review under 28 USC § 1291 by the Court of Appeals, during which Petitioners were allowed to file two supplemental briefs and a lengthy supplemental statement of facts, in addition to the normal appellant briefs. United relies upon the repeated admonition of this Court that "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925, 926 (1925).

### II.

### Both Decisions Below Are Clearly Correct

There has been no miscarriage of justice here. Both decisions below are manifestly, clearly correct. A

mere reading of the two Opinions shows this plainly. As to United, the nub of the matter is (1) Petitioners-plaintiffs were not purchasers from United; (2) United did not in fact sell the cement to Petitioners' competitors or initiate a price advantage to them; and (3) Litton made a one-time purchase of ready-mix concrete, not cement, in Mississippi for use in Mississippi after reserving the right to "reject any or all bids."

In this connection United relies in part on the "Two Court Rule." In situations such as the present one where the findings of fact made by the District Court have received the concurrence of the Court of Appeals, this Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672, 677 (1949), and cases cited, 339 U.S. 605; *Berinyi v. Immigration Director*, 385 U.S. 630, 635, 87 S.Ct. 666, 17 L.Ed.2d 656, 661 (1967). No showing of error exists whatsoever in the case *sub judice*, much less a "very obvious and exceptional" one.

## III.

### The Decisions Below Are Sustainable On Independent, Alternative Grounds

Of all the "Questions Presented" by the Petition for review, only Question No. 1 (Pet. p. 2) even *requests*

certiorari on the asserted basis of intercircuit conflict. Petitioners' Question No. 1 impermissibly attempts to tack to the grant of limited certiorari in the *Western Liquid Asphalt Cases, Copp Paving,* infra, dealing with the "in commerce" reach of the Robinson-Patman Act. However the case *sub judice* is a singularly inappropriate vehicle for any reexamination of that question. The District Court correctly adjudicated and enumerated the following four *additional,* alternative grounds for dismissal of all Robinson-Patman Act charges against United, any of which is independently sufficient:

(1) Petitioners "made no purchase of cement from United . . . ." (Pet. p. 40a; also see generally Pet. pp. 39a-50a);

(2) There were not at least two actual sales by United to at least two different buyers. (Pet. pp. 39a-51a);

(3) The asserted price differential of cement quoted by United to Petitioners and H & W did not proximately injure Petitioners in their business or property, as required by 15 USC § 15. (Pet. pp. 36a-39a); and

(4) The District Court also held United also has available the defense afforded by 15 USC § 13(b). (Pet. pp. 51a-54a).

Moreover, in firmly rejecting all claims against United, the Court of Appeals noted United sold no cement to anyone and "all Mr. Reese's vision and

fortitude in the premises produced for his concern was a lawsuit." (Pet. pp. 78a-79a, notes 4, 7).

Thus even if on the facts the Court of Appeals decision here were in direct conflict with the Ninth Circuit's *Western Asphalt* cases (which it is not), nevertheless such would not warranty certiorari in *this* case. Dismissal of United on all Robinson-Patman Act charges is sustainable and was sustained on the aforesaid additional, independent and alternative grounds. See *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 723, 726, reh. denied 359 U.S. 999 (1959) confirming "while this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial."

## IV.

### There Is No Direct Conflict of Decision

Only Question No. 1 of the Petition (Pet. p. 2-3) asserts any possible claim to certworthiness based on intercircuit conflict. However, the Petition further states, "this question [Petition Question No. 1] arises in this case under 15 USCA § 13(f) . . ." (Pet. p. 3). Thus the question as presented is expressly limited to 15 USC § 13(f) and to the purchase by Litton of ready-mix concrete, not the sale of cement. 15 USC § 13(f) pertains only to "buyers," not "sellers." United was not a buyer. Neither did it sell any cement. Petition Question No. 1 is not even cast in terms of 15 USC

§ 13(a) or in terms of sale or purchase of cement. How then could certiorari be warranted as to United on Petition Question No. 1?

United adopts Respondent Litton's argument point "1" on pages 6-11 of Litton's brief as to the absence of direct intercircuit conflict between this case and the Ninth Circuit's *Western Asphalt Cases, Copp Paving Co., Inc. v. Gulf Oil Company*, 487 F.2d 202 (9 Cir. 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974).

Moreover, the Fifth Circuit's *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5 Cir. 1973), cert. denied 414 U.S. 1116 (1973) and the Tenth Circuit's *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10 Cir. 1972), cert. denied 408 U.S. 928 (1972), both involved sale of *automotive gasoline*, plainly having a closer nexus to interstate commerce than one-time construction of the Litton shipyard at Pascagoula, Mississippi.

## V.

### There Is No Important Question of Federal Law

As previously noted, this case pivots narrowly on its own peculiar facts, adjudicates no new or novel principle of law, and is supportable on alternative, independent grounds. It will affect few if any other than the direct parties. It simply presents no important question of Federal Law to warrant grant of certiorari.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN M. GROWER
W. TIMOTHY JONES

---

W. Timothy Jones
Counsel for Respondent,
United Cement Company

OF COUNSEL:
BRUNINI, GRANTHAM, GROWER & HEWES
Post Office Drawer 119
Jackson, Mississippi 39205

**CERTIFICATE**

I, W. TIMOTHY JONES, one of the attorneys for the separate Respondent, United Cement Company, hereby certify that I have this day mailed the requisite number of true copies of United's foregoing brief to counsel for all parties separately represented at their usual post office address, by first class U.S. Mail, postage prepaid, as follows: Norman Breland, Esq., counsel for Petitioners at P. O. Box 396, Gulfport, Mississippi 39501; Charles E. Foster, Esq., counsel for Litton, 360 N. Crescent Drive, Beverly Hills, California 90210; and Karl Weisenburg, Esq., counsel for Litton, P. O. Box 26, Pascagoula, Mississippi 39567.

DATED: September ____, 1974.

W. TIMOTHY JONES